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No. 92-724

In the Supreme Court of the United States

OCTOBER TERM, 1992

PHOENIX ENGINEERING, INC., ET AL., PETITIONERS

v.

MK-FERGUSON OF OAK RIDGE CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Sections 8(e) and 8(f) of the National Labor Relations Act, 29 U.S.C. 158(e) and 158(f), expressly permit private employers to implement project labor agreements requiring all subcontractors performing work on a construction project to adhere to collective bargaining agreements that establish uniform terms and conditions.

The question presented is whether the doctrine of implied preemption under the NLRA prohibits a private contractor, retained by a federal agency in its proprietary capacity, from implementing a project labor agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-30A) is reported at 966 F.2d 1513. The several orders of the district court (Pet. App. 32C-36C, 37D-40D, 41E-42E, 43F-49F, and 50G-56G) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1992. A petition for rehearing was denied on July 27, 1992. Pet. App. 31B. The petition for a writ of certiorari was filed on October 26, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since the Manhattan Project during World War II, the United States has continuously owned and operated a large industrial complex in and around Oak Ridge, Tennessee. The Department of Energy's (DOE's) Oak Ridge Operations facility (ORO) conducts energy research and development, produces nuclear weapons, and undertakes associated activities. In order to fulfill its atomic research and production responsibilities, ORO necessarily engages in a variety of construction activities, involving both new projects and alteration of existing facilities. See Gov't C.A. Br. 3-5.

Although DOE continually monitors activity at ORO, independent, private sector contractors known as management and operating contractors are responsible for day-to-day operations. See *United States* v. *New Mexico*, 455 U.S. 720, 722-727 (1982); *United States* v. *Boyd*, 378 U.S. 39, 41-43 (1964); *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232, 234-235 (1952). On April 30, 1990, after competitive bidding, DOE selected respondent MK-Ferguson of Oak Ridge Co. to be its construction manager for the ORO facility effective October 1, 1990. Pet. App. 3A; Gov't C.A. Br. 7.

In the spring of 1990, during the selection process for a new construction manager, a labor agreement between DOE's then-prime contractor for construction services and the Knoxville Building and Construction Trades Council (the Council), an umbrella organization representing craft unions, expired. When negotiations to extend the existing agreement broke down, Council members began a strike at ORO which effectively shut down construction work at the site, including construction of a critical security

project. MK-Ferguson, which by that time had been selected as construction manager, commenced negotiations with the Council. See Pet. App. 3A; Gov't C.A. Br. 7.

Those negotiations resulted in the Project Labor Agreement between MK-Ferguson and the Council, which requires each subcontractor on ORO projects to agree to be bound by the terms set forth in the Project Labor Agreement, and in particular to recognize the unions as the collective bargaining agents for its employees. The Project Labor Agreement also established a hiring hall procedure for the referral of employees, whereby a subcontractor must notify the unions of the number and classification of craft employees needed and allow the unions to supply the employees. Under the agreement, each subcontractor can hire up to four "key" craft employees directly before requesting applicants from the job referral system. Pet. App. 3A-4A, 52G.

2. The Project Labor Agreement became effective on October 1, 1990. On December 3, 1990, petitioners, a group of non-union construction firms, individual construction workers not affiliated with any union, and two contractor associations, filed a complaint in the United States District Court for the Eastern District of Tennessee seeking declaratory and injunctive relief against MK-Ferguson and the Council. Although DOE is not a party to the Project Labor Agreement, did not require MK-Ferguson to enter into the Project Labor Agreement, and played no role in its negotiation, petitioners also sued the United States, the Secretary of Energy, and the manager of DOE's ORO facility (the federal respondents).

Over the course of the proceedings during 1991, the district court denied all relief sought by petition-

ers. First, the district court denied petitioners' motion for a preliminary injunction against enforcement of the terms of the Project Labor Agreement. Pet. App. 50G-56G. Petitioners appealed the denial of the preliminary injunction and sought a stay pending appeal, which the district court denied. Pet. App. 41E-42E. Second, the district court dismissed all labor law claims against the federal respondents, Pet. App. 43F-49F, and granted summary judgment to MK-Ferguson and the Council on petitioners' labor law claims, Pet. App. 37D-40D.[1] The district court ultimately entered a final judgment against petitioners on all claims on October 28, 1991. Pet. App. 32C-36C.

3. The court of appeals affirmed the judgment of the district court.[2] The court acknowledged that, under Sections 8(e) and 8(f) of the National Labor Relations Act, 29 U.S.C. 158(e) and 158(f), "the Project Labor Agreement would be valid if entered into by a private general contractor." Pet. App. 13A. This conclusion did not suffice to validate the agreement, however, because the court assumed, but did not decide, that DOE was involved in the negotiation of the Project Labor Agreement. *Ibid.*

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[1] The district court initially declined to dismiss petitioners' claims against the federal respondents and MK-Ferguson under the Competition in Contracting Act (CICA), 41 U.S.C. 253, and the federal acquisition regulations. Pet. App. 48F-49F, 39D. Those claims were subsequently dismissed (Pet. App. 33C-36C), however, and are not at issue in this petition.

[2] Pursuant to the request of the parties, the court consolidated petitioners' appeals from the denial of the preliminary injunction and the entry of a final judgment. Pet. App. 6A.

The court of appeals recognized that this Court has identified two types of labor preemption that limit at least some governmental action: *Garmon* preemption, which prohibits States from "regulat[ing] activity that the NLRA protects [or] prohibits," *Wisconsin Dep't of Industry* v. *Gould Inc.*, 475 U.S. 282, 286 (1986); and *Machinists* preemption, which "precludes state and municipal regulation 'concerning conduct that Congress intended to be unregulated' " when it enacted the NLRA, *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608, 614 (1986) (quoting *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 749 (1985)). See *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *International Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).[a] The court of appeals held that *Garmon* preemption was not implicated because petitioners did not allege that "DOE somehow infringed on the jurisdiction of the NLRB or that the DOE created a regulatory scheme governing conduct prohibited by the NLRA." Pet. App. 15A. The court further held that *Machinists* preemption did not apply because Congress did regulate project labor agreements, specifically allowing them in the construction industry, and because DOE acted as a purchaser in the market place—not as a regulator. Pet. App. 23A-24A. The court therefore concluded that

[a] The court of appeals recognized that this Court has never squarely held that *Machinists* principles restrict the scope of federal agencies' authority. Pet. App. 16A-17A. The court did suggest that the doctrine might apply to DOE, Pet. App. 19A-20A, but it was unnecessary for the court to decide this issue because it determined that *Machinists* principles would not apply to the contract in this case in any event.

"[t]he NLRA does not preempt the action of the DOE in negotiating the Project Labor Agreement in this case." Pet. App. 24A.

ARGUMENT

1. Petitioners contend (Pet. 11) that the courts of appeals are in conflict. We agree. See Brief for the United States as Amicus Curiae in Nos. 91-261 & 91-274, at 9 n.6;[4] compare *Associated Builders and Contractors* v. *Massachusetts Water Resources Authority*, 935 F.2d 345 (1st Cir. 1991) (en banc) (*Machinists* doctrine prevents state agency from implementing project labor agreement negotiated by private construction company), cert. granted *sub nom. Building & Construction Trades Council* v. *Associated Builders & Contractors*, 112 S. Ct. 1935 (1992) (Nos. 91-261 & 91-274 (argued Dec. 9, 1992)) (*Boston Harbor*), and *Glenwood Bridge, Inc.* v. *City of Minneapolis*, 940 F.2d 367 (8th Cir. 1991) (*Machinists* doctrine prevents city from implementing project labor agreement), with *Associated Builders & Contractors, Inc.* v. *City of Seward*, 966 F.2d 492 (9th Cir. 1992) (*Machinists* doctrine does not prevent city from requiring project labor agreement), petition for cert. pending, No. 92-709, and *Phoenix Engineering, Inc.* v. *MK-Ferguson of Oak Ridge Co.*, 966 F.2d 1513 (6th Cir. 1992) (decision below). The question whether a government agency, acting in its capacity as a purchaser of construction services, may approve or enter into a project labor agreement is currently before the the Court in *Boston Harbor*, Nos. 91-261 & 91-274. Accordingly, the

[4] We have provided a copy of this brief to petitioners' counsel.

Court should hold the petition and dispose of it in light of the decision in that case.

2. If the Court reverses the decision of the First Circuit in *Boston Harbor*, which we have argued as *amicus curiae* is the correct result, then certiorari should be denied in this case. If, however, the Court finds that the state agency's action in *Boston Harbor* is preempted, then this case should be remanded to the court of appeals for full consideration of several issues it did not need to resolve because of its holding on the preemption question.

a. In *Boston Harbor*, the state agency explicitly approved the project labor agreement and, pursuant to state procurement law, actually incorporated it into the bid specifications for the project. See Brief for the United States as Amicus Curiae, at 2-4, in Nos. 91-261 & 91-274. Here, by contrast, there is no governmental involvement in the labor relations between MK-Ferguson and the subcontractors. DOE is not a party to the Project Labor Agreement in this case, and its contract with MK-Ferguson did not give it the right to review or approve the Project Labor Agreement. Although MK-Ferguson employees periodically met with DOE officials during the negotiations to discuss objectives and approaches, DOE did not participate in, direct, or control the negotiations which resulted in the Project Labor Agreement, nor did DOE review or approve the agreement itself. In fact, in addressing petitioners' CICA claim, the court of appeals expressly held that petitioners had not demonstrated that an agency relationship existed between DOE and MK-Ferguson. Pet. App. 29A. Thus, even if *Machinists* principles are applicable to governmental implementation of project labor agree-

ments (the question presented in *Boston Harbor*), the contract in this case can be upheld. Although the court of appeals assumed for purposes of its decision that DOE was involved in the negotiation of the Project Labor Agreement, Pet. App. 13A, it did not need to decide the question due to its resolution of the preemption issue.

b. This case represents a challenge to the contracting practices of the federal government, not a state or local government as in *Boston Harbor*. The doctrine of implied preemption, upon which petitioners rely, is rooted in the Supremacy Clause of Article VI of the Constitution and operates to invalidate state and local action which conflicts with federal law. Application of this doctrine to the congressionally authorized activities of DOE is misplaced. Although this Court has applied *Machinists* preemption only to state and local governmental action, the court of appeals concluded that dicta in *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 110-111 (1989), "seemed to extend *Machinists* preemption to federal action." Pet. App. 17A. Because it found that there was no preemption in any event, however, the court of appeals did not need to resolve the question.[5]

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[5] Executive Order No. 12,818, 57 Fed. Reg. 48,713 (Oct. 23, 1992), essentially forbids the use of project labor agreements on federal or federally funded construction projects. This Executive Order has no bearing on this case: Section 1(c) exempts contracts awarded before the effective date of the order and subcontracts under such contracts, whenever awarded; the contract in this case became effective October 1, 1990. See United States Supp. Br. in Nos. 91-261 & 91-274. (We have provided a copy of this brief to petitioners' counsel.)

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of *Building & Construction Trades Council* v. *Associated Builders and Contractors*, Nos. 91-261 & 91-274 (argued Dec. 9, 1992).

Respectfully submitted.

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